



November 5, 2021

**Submitted via FOIA Online**

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1677  
[hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**Re: FOIA Request for Form U Reporting Forms Submitted Under TSCA  
Chemical Data Reporting Rule for Phenol, Isopropylated Phosphate (3:1)**

Dear Freedom of Information Officer:

This request for records in accordance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, is submitted by Earthjustice.

**RECORDS REQUESTED**

We seek copies of all “Form U” reporting forms submitted or revised during the 2020 Chemical Data Reporting (“CDR”) period for phenol, isopropylated phosphate (3:1) (“PIP (3:1)”). Our FOIA request is limited to reports filed during the latest reporting cycle by each primary submitter and any joint submitter for PIP (3:1) and any revisions to these reports. The time period covered by this request is January 1, 2020 through the date that responsive records are produced.

**FEE WAIVER REQUEST**

Pursuant to 5 U.S.C. § 552, we request a fee waiver because “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(1). As demonstrated below, all of the four factors related to the first fee waiver requirement, as specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)–(iv), weigh in favor of granting our fee waiver request. Moreover, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

**I. THIS REQUEST IS IN THE PUBLIC INTEREST.**

**1. The Requested Records Concern the Operations or Activities of the Federal Government.**



The subject matter of the requested records concerns “identifiable operations or activities of the Federal government.” 40 C.F.R. § 2.107(l)(2)(i). The records concern “identifiable operations” because they relate to EPA’s collection of information concerning a chemical that is currently subject to risk management under TSCA. The Department of Justice Freedom of Information Act Guide acknowledges that “in most cases records possessed by the federal agency will meet this threshold” of identifiable operations or activities of the government.<sup>1</sup> There is no question that this is such a case.

## **2. Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities.**

The next factor considered by EPA is whether disclosure of the requested records is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already . . . in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 15 C.F.R. § 4.11(l)(2)(ii), of government operations or activities. PIP (3:1) is designated as a persistent, bioaccumulative, and toxic (“PBT”) chemical under TSCA. In January 2020, EPA finalized a rule that “prohibits the processing and distribution of PIP (3:1) and PIP (3:1)-containing products, with specified exclusions.” Phenol, Isopropylated Phosphate (3:1) (PIP 3:1); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h), 86 Fed. Reg. 894 (Jan. 6, 2020) (to be codified at 40 C.F.R. pt. 751). However, that prohibition has yet to take effect because EPA had twice extended the rule’s compliance deadlines, and, in October 2021, EPA proposed a third extension lasting until October 2024. EPA has also announced its plans to “issue a proposal for a new separate rulemaking on all five PBT chemicals,” including PIP (3:1), “to further reduce exposures, promote environmental justice, and better protect human health and the environment.”<sup>2</sup> The requested information would enable the public to better understand the impacts of EPA’s proposed extension of the PIP (3:1) compliance deadline and to participate in the upcoming comment periods on that proposal and any revised PBT rules.

## **3. Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in PIP (3:1).**

EPA next considers whether disclosure will contribute to “understanding of the subject by the public.” 40 C.F.R. § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the

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<sup>1</sup> U.S. Dep’t of Justice, Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers 27 (2014), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf>.

<sup>2</sup> EPA Announces Plan for New Rulemaking on PBT Chemicals, Extends Existing Compliance Date to Protect Supply Chains, EPA, <https://www.epa.gov/chemicals-under-tsc/epa-announces-plan-new-rulemaking-pbt-chemicals-extends-existing-compliance> (last updated Sept. 30, 2021).



subject matter of the FOIA request, “as opposed to the individual understanding of the requester.” *Id.* In evaluating a fee waiver request, EPA considers whether the requester has “expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.* Federal courts have held that public interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000).

Here, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” PIP (3:1). As noted above, EPA is currently considering changes to the substance and timing of its PIP (3:1) rule. According to the 2016 CDR data, nearly 6,000,000 pounds of PIP (3:1) are manufactured in the United States and the chemical “is widely used for both its flame retardant and lubricating properties,” in products including, but not limited to, “textiles, rubber, polyurethane foam, antistatic agent, cellulose, cotton, cutting oils, electronic equipment such as video display units cables, casting resins, glues, engineering thermoplastics, epoxy resins, and phenolic resins.”<sup>3</sup> There is thus broad interest in PIP (3:1) and in the specific information contained within the requested Form U documents.

Earthjustice also has mechanisms in place to share information obtained from the requested records with the general public and other interested organizations. Earthjustice has submitted and publicized comments on EPA’s proposed PBT rules and on other TSCA rules and risk evaluations, and has published numerous articles, blogs, social media postings, and press releases concerning the regulation and evaluation of toxic chemicals. Earthjustice is well-positioned to share the requested information with interested audiences. As of this past February, 1.8 million people were on Earthjustice’s email list, and its quarterly print magazine had a circulation of approximately 100,000 supporters. Last year, Earthjustice’s website received approximately 530,000 views on average every month. Additionally, it employs or retains communications professionals that can disseminate newsworthy information obtained from this request to the media.

#### **4. The Contribution to Public Understanding of Government Operations or Activities Will Be Significant.**

The fourth factor EPA considers is whether the records are “likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (stating that the relevant test is whether public understanding will be increased after disclosure, as opposed to the public’s understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information . . . will enhance the public’s understanding,” the fourth factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

This request satisfies the fourth factor. One cannot retrieve the requested records in their entirety, or all the information contained therein, through EPA’s website or internet searches.

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<sup>3</sup> EPA, *Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Phenol, isopropylated, phosphate (3:1)* 4–6 (Aug. 2017), <https://www.epa.gov/sites/default/files/2017-08/documents/pip3-1-use-information-8-10-17.pdf>.



Thus, the public's understanding of PIP (3:1) will "be significantly enhanced by the disclosure." See 15 C.F.R. § 4.11(l)(2)(iv).

## **II. EARTHJUSTICE HAS NO COMMERCIAL INTEREST IN DISCLOSURE OF THE REQUESTED RECORDS.**

Earthjustice is a 501(c)(3) nonprofit organization and it does not have any "commercial interest that would be furthered by the requested disclosure" of information. 40 C.F.R. § 2.107(l)(3)(i). The requested records would be used only in furtherance of its mission to inform and protect the public on matters of vital importance to the environment and public health.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify us and inform us of the basis for your decision.

## **RECORD DELIVERY**

To the extent practicable, Earthjustice seeks electronic copies of the documents stated in this request in native file format, or, if that is not practicable, with full metadata for all fields. See 5 U.S.C. § 552(a)(3)(B) (stating that the agency shall provide records in any form or format if the record is readily reproducible in that form or format). If any information requested herein was, but is no longer, in EPA's possession or subject to its control, please state whether it (a) is missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) is otherwise disposed of, and in each instance, please explain the circumstances surrounding and authorization for such disposition of it, and state the date or approximate date of it.

Agencies are advised to "make discretionary disclosures of information" and refrain from withholding records "merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."<sup>4</sup> Moreover, to the extent that any information in the requested records has been designated as confidential business information ("CBI"), EPA must determine whether such information is nonetheless subject to disclosure under TSCA section 14.

TSCA section 14(b)(3) defines "information not protected from disclosure" to include:

"(A) *any general information* describing the manufacturing volumes, expressed as specific aggregated volumes or . . . in ranges; or

(B) a general description of a process used in the manufacture or processing and industrial, commercial, or consumer functions and uses of a chemical substance, mixture or article containing a chemical substance or mixture . . . ."

15 U.S.C. § 2613(b)(3) (emphasis added). Significant portions of the Form U submissions for PIP (3:1) fall within these provisions because they describe processes used in manufacturing and processing in broad terms (e.g., Section II.B and III.A) or characterize uses and related exposures

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<sup>4</sup> Memorandum from the Att'y General to Heads of Exec. Dep'ts and Agencies (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.



using general categories (e.g., Section III.B), based on commonly accepted descriptors and ranges and percentages rather than specific values. As EPA has concluded, “general use and process information collected under 40 CFR § 711.15(b)(4) of CDR . . . is not the type of specific information referenced in TSCA § 14(c)(2)” and thus should fall under section 14(b)(3).<sup>5</sup>

Second, for any CDR information covered by this request to which these grounds for disclosure may not apply, EPA should expeditiously review and determine the adequacy of the submitter’s substantiation of its CBI claims under section 14(g)(1). For example, substantiation is essential to scrutinize the basis for CBI claims made under Part I of the Form U for the parent company name (and name of any joint submitter) in relation to the information submitted, and the site name and location where the chemical is manufactured, imported, or processed by the submitter. This information is vital to characterizing exposure pathways, environmental fate and distribution, and identifying potential exposed or susceptible subpopulations; CBI treatment will rarely, if ever, be warranted.

If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

1. Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
2. State the exemption you deem to be applicable to each information request;
3. State with particularity the reason why such exemption is applicable to each information request;
4. Exercise your discretion to release such records notwithstanding the availability of a basis for withholding; and
5. If you do not use your discretion to release such complete and unredacted records, (a) examine each record to determine if reasonably segregable non-exempt information exists that may be released after redacting information deemed to be exempt and (b) provide us with a copy of each record with redactions of only the information that you have determined to be properly withheld.

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply “must . . . indicate within the relevant time period the scope of documents [EPA] will produce.” *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please also produce the records on a rolling basis; at no point should EPA’s search for, or deliberations concerning, certain records delay the production of others that EPA has already retrieved and

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<sup>5</sup> *Frequent Questions About TSCA CBI*, Response to Q7, <https://www.epa.gov/tsc-cbi/general-qs-and-relating-cbi-under-tsc-amended-frank-r-lautenberg-chemical-safety-21st> (last updated Sept. 23, 2021). Although the Q&A related to whether CDR reports are the type of “specific” processing and use information for which substantiation of CBI claims is not required under section 14(c)(2), EPA’s conclusion that this provision does not apply necessarily means the CDR-reported processing and use information is “general” and thus cannot be withheld from disclosure under section 14(b)(3).



elected to produce. Please promptly make available copies of all requested records, preferably through the FOIA Online system or via email at the contact information below:

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If you find that this request is unclear, the responsive records are voluminous, or you have any other questions, please contact me via email at [jkalmusskatz@earthjustice.org](mailto:jkalmusskatz@earthjustice.org) to discuss. Thank you for your assistance in this matter.

Sincerely,

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